

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:CTM:LN:TL-N-5553-00

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date: November 9, 2000

to: Ethelyn McDaniel, Team Leader, LMSB, HMCT 1755
Patricia Lozano, Team Coordinator, Long Beach POD, LMSB, HMCT 1755

from: Joyce M. Marr, Attorney
June Y. Bass, Associate Area Counsel (LMSB)

subject:

[REDACTED]
Tax Years [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]
TIN: [REDACTED]

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

This is in reply to your oral request made on [REDACTED], for advice on various issues which were raised when the representatives of the former [REDACTED] ([REDACTED]) consolidated group were informed that a corporation which the remaining members of the group wished to designate as agent, pursuant to Treas. Reg. § 1.1502-77(d), is required to have been a member of the [REDACTED] consolidated group during the years to which the designation would apply.

ISSUES

(1) May [REDACTED], a Delaware corporation ("[REDACTED]") continue to be the designated agent of the [REDACTED] consolidated group even though [REDACTED] has been completely liquidated?

(2) If a new agent is designated and approved by the Internal Revenue Service (the Service) pursuant to Treas. Reg. § 1.1502-77(d), would such designated agent be ultimately liable for any proposed tax deficiency, even if the deficiency is primarily the result of adjustments made by the Service to [REDACTED]'s separate taxable income?

CONCLUSIONS

(1) (b)(5)(AC)

[REDACTED]

The remaining members of the [REDACTED] consolidated group may designate as a new agent, pursuant to Treas. Reg. § 1.1502-77(d), only a corporation which was a member of the group during the consolidated return years in issue.¹ If [REDACTED] has not been legally dissolved when the new designation is made, then statements designating the new agent should be obtained from [REDACTED], as well as the other remaining members.

(2) The Service would be authorized to collect the unpaid tax from the new designated agent or any other member of the [REDACTED] consolidated group included in the consolidated group's return(s) for the year(s) for which there is unpaid tax liability.

¹At a meeting held by the Service's audit team with the Taxpayer on [REDACTED], the Taxpayer represented that three of the members of the [REDACTED] consolidated group during the years in issue are still existence: [REDACTED], [REDACTED], and [REDACTED]. After the meeting, the Team Coordinator for the current audit cycles indicated that none of these three entities are "shell" corporations.

FACTS²

The [REDACTED] consolidated group filed consolidated returns for the years [REDACTED] through [REDACTED]. The consolidated group ceased to exist in [REDACTED] when the common parent, [REDACTED], transferred its assets to its foreign parent, [REDACTED], [REDACTED] and dissolved.

The remaining members of the [REDACTED] consolidated group during the years [REDACTED] through [REDACTED] designated [REDACTED], another member of the consolidated group during the years [REDACTED] through [REDACTED], as designated agent under Treas. Reg. § 1.1502-77(d). Such designation was approved by the former District Director of the Southern California District.

[REDACTED] has recently been completely liquidated, but has not been dissolved.³ [REDACTED]'s assets were transferred to a recently formed corporation, [REDACTED] ([REDACTED]) pursuant to an asset purchase agreement.⁴ The Taxpayer represented at the meeting held on [REDACTED], that [REDACTED] has agreed to assume [REDACTED]'s tax liabilities. [REDACTED] has the same assets and employees as [REDACTED] previously had and operates [REDACTED]'s former business. We have also found from LEXIS that [REDACTED], like [REDACTED], is a Delaware corporation.

The Taxpayer's representatives had wanted to designate [REDACTED] as agent pursuant to Treas. Reg. § 1.1501-77(c), because it is anticipated that the majority of the adjustments proposed by Exam will be adjustments to the separate taxable income of [REDACTED].⁵

²Our understanding of the facts of this case is based solely upon information received from the Service's audit team, except for certain information obtained from LEXIS as specified herein. If the actual facts are different from those stated herein, our legal conclusions and recommendations might be different.

³According to [REDACTED]'s controller, the reason that [REDACTED] was not dissolved is that Delaware law prohibits dissolution of a corporation with an outstanding tax liability to another state and [REDACTED] has unresolved tax problems in the State of [REDACTED].

⁴There was no merger.

⁵ Treas. Reg. §1.1502-11 provides, in part, that the consolidated taxable income for a consolidated return year shall be determined by taking into account the separate taxable income of each member of the group and certain other listed items.

However, we explained to the representatives that a designation of [REDACTED] as agent under Treas. Reg. § 1.1502-77(d) would not be approved by the Service because it is the National Office's position that an agent designated pursuant to such regulation must have been a member of the consolidated group during the years for which it is designated as agent.⁶

After being informed that [REDACTED] cannot be a designated agent pursuant to Treas. Reg. § 1.1502-77(d), the Taxpayer's representatives asked the Exam Team certain questions, two of which are stated above as Issues (1) and (2).

DISCUSSION

Issue (1) Does [REDACTED] continue to have the capacity to act as designated agent despite the fact that it has been liquidated?

Corporate existence and capacity is determined by the law of the state of incorporation. Oklahoma Natural Gas Co. v. State of Oklahoma, 273 U.S. 257 (1927); Chicago T&T Co. v. Forty One Thirty Six Wilcox Bldg. Corp., 302 U.S. 120 (1937).

In the instant case, [REDACTED]'s state of incorporation is Delaware, so the laws of that state must be examined to determine [REDACTED]'s capacity to act as designated agent despite its liquidation.

In Shanghai Power Co. v. Delaware Trust Co., 316 A.2d 589 (Del. Ch. 1974), aff'd in part, rev'd in part on other grounds, 378 A.2d 624 (Del. 1977), Delaware Trust Co. argued that Shanghai Power Co. (SPC), a Delaware corporation, was, "in effect, in a state of de facto dissolution" since it had "lost all of its property" and "not been involved . . . in any . . . active business endeavor since 1950."⁷ The Court concluded that SPC was not in de facto dissolution, although it implied that given

⁶ Unfortunately, although [REDACTED] maintains the same business operations, employees, and assets as [REDACTED] formerly maintained, [REDACTED] may not be designated as agent for the [REDACTED] consolidated group pursuant to Treas. Reg. § 1.1502-77(d) since it was not a member of such group during the years in issue.

⁷ During World War II, Japan seized control of SPC's properties. Then, around 1950, SPC's properties were expropriated by Communist China. However, as a result of a claim filed under the War Claims Act of 1948, SPC was issued an award in 1967 in its favor for nearly \$8,000,000.00 and received partial payment thereon of almost \$5,000,000.00.

sufficient evidence a Delaware corporation may be found to be in de facto dissolution. According to the court, termination of a corporation's business activities would "not necessarily constitute a de facto dissolution" provided that the corporation was still solvent.

Relying upon the discussion of the de facto dissolution issue in Shanghai Power Co. v. Delaware Trust Co., in Lincoln Fed. Sav. and Loan Ass'n v. Thomson McKinnon Sec., Inc., 1990 U.S. Dist LEXIS 3183 (D. N.J. March 21, 1990), the Court indicated that sufficient evidence that Thomson McKinnon Sec., Inc. was "insolvent and . . . in the winding-up process" might allow a de facto dissolution to be found under Delaware law.

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A dissolved Delaware corporation is deemed pursuant to 8 Del. Code § 278 to continue in existence for a period of 3 years from the date of its dissolution for the limited purpose of winding up its affairs (including settling its tax liabilities). However, it may be inferred from Treas. Reg. § 1.1502-77(d) that a dissolved corporation may not act as designated agent, since the regulation states that "[i]f the common parent corporation contemplates dissolution, or is about to be dissolved, or if for any other reason its existence is about to terminate, it shall forthwith . . . designate . . . another member to act as agent in its place"

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Only a remaining member of the consolidated group during the years in issue may be designated by the other remaining group members to act as a new agent under section § 1.1502-77(d); if the surviving members fail to designate a new agent, the Service will have no option other than to deal separately with each remaining member. If a new designation is made before [REDACTED] is legally dissolved, then statements designating the new agent should be obtained from [REDACTED] as well as the other remaining members.

Issue (2) Whether a new agent designated and approved by the Service pursuant to Treas. Reg. § 1.1502-77(d) would be ultimately liable for any proposed tax deficiency against the former [REDACTED] consolidated group?

Under I.R.C. § 7701(a)(1), a person is to "be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." A consolidated group is not a person, but each corporate member of the group is a separate person. Generally, a member of a consolidated group is severally liable for the income tax liability of the group. See Treas. Reg. § 1.1502-6(a). When a tax is severally owed by two or more taxpayers, the Service has the authority to collect the full amount of the unpaid tax from any of the liable taxpayers. See U.S. Life Title Ins. Co. of Dallas v. United States, 784 F.2d

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recommend that before further contacts are made with [REDACTED], two powers of attorney for the years under audit be obtained for [REDACTED], one from [REDACTED] as designated agent and one from each of the remaining corporations including [REDACTED]. The Service can explain that it would like the powers of attorney simply as a precaution to confirm that [REDACTED] remains so authorized since he apparently now is an employee of [REDACTED] (and not [REDACTED]). We recommend that once a new agent is designated pursuant to Treas. Reg. § 1.1502-77(d), the audit team secure a power of attorney from the new designated agent authorizing [REDACTED] to represent the consolidated group for the years under audit.


1238, 1243 (5th Cir. 1986) (regarding application of several liability to responsible persons in context of I.R.C. § 6672).

Thus, under the consolidated return regulations, any member of a consolidated group may have to pay the entire amount of an income tax deficiency assessed against the consolidated return group. Each member is deemed to have consented to this several liability by having filed a consolidated return. See I.R.C. § 1501.

Based on the foregoing, the Service would be authorized to collect the unpaid tax from the new designated agent or any other member of the [REDACTED] consolidated group included in the consolidated group's return(s) for the year(s) for which there is unpaid tax liability.⁹

This advice has been informally discussed with the National Office and will be sent to the National Office for post-review. If the National Office recommends any changes, we will apprise you as soon as possible.

Please contact the undersigned at (949) 360-2688 if you have any questions concerning the foregoing or if you require further assistance.


JOYCE M. MARR
Attorney

⁹The procedural requirements are added by Treas. Reg. § 1.1502-77(a) that:

[A]ny notice and demand for payment will name each corporation which was a member of the group during any part of such period . . . and any levy, any notice of a lien, or any other proceeding to collect the amount of any [consolidated group] assessment, after the assessment has been made, will name the corporation from which such collection is to be made.